

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

FILED

MAR 28 2002

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Pending before the Court is a request by non-Party Palm, Inc. ("Palm") to file eight documents¹ under seal and to seal a portion of these proceedings. PalmSource² Chief Competitive Officer Michael Mace has been presented as a witness by the Litigating States in conjunction with a hearing being held on the appropriate remedy for antitrust violations found by the District Court in this case and affirmed by the Court of Appeals. Having received proffers from Palm and Defendant Microsoft and upon review of the documents, the Court concludes that Palm's motion to seal the documents and to close the courtroom for a limited period of time shall be granted.

Pursuant to Palm's motion, the Court discussed the issue with counsel for Plaintiffs, Microsoft, and Palm both on the record in open court and in a bench conference, the transcript of which remains under seal. To summarize, during his cross-examination of Mr. Mace, counsel for

¹The eight documents are Defendant's Exhibits 660, 661, 676 and 1181 and Plaintiffs' Exhibits 946, 954, 984, and 1637.

²PalmSource, Inc. is a wholly owned subsidiary of Palm, Inc.

Defendant Microsoft plans to ask questions regarding possible business alliances between Palm and other industry participants, which Microsoft characterizes as its "competitors." Mr. Mace's responses to this line of questioning are likely to elicit information regarding these potential alliances which remain pertinent to current Palm business concerns. Certain of the aforementioned documents reflect these same potential alliances. Also during his cross-examination, counsel for Microsoft plans to ask Mr. Mace about a set of documents which reflect, in part, Palm's assessment of its own competitive position, as well as specific aspects of Palm's competitive strategy. The documents are both current and forward looking. Once again, Mr. Mace's responses to the inquiry from Microsoft's counsel are likely to reveal sensitive corporate information. Palm proffered and explained during its sealed colloquy with the Court and the parties that release of this sensitive corporate information would cause substantial harm to Palm's competitive position. The parties and Palm agree that the relevant portion of the cross-examination should be conducted under seal and that the exhibit(s) attendant thereto should be maintained in the record under seal.

Case law from the D.C. Circuit acknowledges that, in general, "[t]he first amendment guarantees the press and the public a general right of access to Court proceedings." *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991). However, this right of access is far from absolute, as courts have recognized numerous exceptions to the general rule of openness. *See Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978) (listing various exceptions). Although much of the available case law on the subject of openness arises in the criminal context, the "presumption of openness" applies in the civil context as well. *See Johnson v. Greater Southeast Community Hosp. Ctr.*, 951 F.2d 1267, 1277 (D.C. Cir. 1991). This presumption may be overcome "by an overriding interest based on findings that disclosure is

essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984). Protecting an entity’s “competitive standing” through retained confidentiality in business information has been recognized as an appropriate justification for the restriction of public or press access. *Nixon*, 935 F.2d at 287.

The D.C. Circuit has elaborated that a court contemplating restricting access to court documents should consider the following six factors:

(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.

See *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1980). Applying these factors, the Court finds that there is no particular need for public access to the documents at issue and the testimony relating to those eight documents, aside from the more generalized public interest in these judicial proceedings. The Court notes that the documents at issue (like the discussion relating to them) are internal Palm documents which have been treated at all times as “Highly Confidential” pursuant to this Court’s Protective Order dated May 27, 1998. Palm, a third party, has clearly objected to disclosure of this information in open court and has displayed strong property and privacy interests in maintaining the confidentiality of the information at issue. As noted above, the relevant documents and testimony will be introduced as part of Microsoft’s cross-examination of Mr. Mace.

Having reviewed the relevant documents and, in light of Microsoft’s proffered line of inquiry and Palm’s proffered business interest in maintaining confidentiality, the Court finds that any release, via testimony or display of the documents, of the information contained in the

pertinent exhibits would result in "clearly defined and very serious injury" to Palm's business interest.³ *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981) (quoting *United States v. International Business Machines, Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)). As a result, the Court concludes that Microsoft's inquiry regarding these documents and the subjects discussed therein should be conducted under seal, in a closed courtroom. Likewise, the Court concludes that the documents themselves should be filed under seal. In this regard, the Court notes that the closure of the courtroom and the sealing of documents and testimony is narrowly tailored to include only the specific information which, if released, would be detrimental to Palm's business interest. *See Press-Enterprise*, 464 U.S. at 510. The relevant information has heretofore remained confidential and would not become public but for its use in these proceedings. Other portions of the cross-examination of Mr. Mace will be held in open court and on the public record, as will all other appropriate portions of evidence in this proceeding.

Accordingly, it is this 28th day of March, 2002, hereby

ORDERED that the above-specified portions of proceedings in this case shall be conducted under seal; and it is further


ORDERED that the eight relevant documents shall be filed under seal; and it is further

ORDERED that, pursuant to the parties' agreement and in accordance with the designation of the Palm documents as "Highly Confidential," with the exception of Mr. William H. Neukom, all Microsoft employees, including in-house counsel, shall be excluded from the Courtroom during the presentation of evidence relating to the above-described confidential Palm business documents and testimony. Mr. Neukom will not have access to the documents under

³The Court notes, for the benefit of the Court of Appeals, that the most pertinent information to this finding was conveyed during the sealed bench conference on March 28, 2002.

seal, except to the extent that they are used during examination by counsel.

SO ORDERED.


COLLEEN KOLLAR-KOTELLY
United States District Judge